Supreme Court, U.S.
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NO:_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

CHARLES G. MILDEN and
SUSAN P. MILDEN, debtors,
Petitioners,

vs.

STATE OF THE ART, Inc. et al,
Respondents

A PETITION FOR A WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT

***

PETITION FOR WRIT OF CERTIORARI

***

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42 pp

QUESTION PRESENTED FOR REVIEW

1. Did the California courts allow a violation of petitioners' constitutionally protected right to due process in terms meant by the Fifth and Fourteenth Amendments to the U.S. Constitution, and Art. I, Secs. 1, or 7, or 16, or 26, or Art. IV, Sec. 10, of the Constitution of the State of California?

PARTIES AND RESPECTIVE CAPACITIES

Charles G. Milden and Susan P. Milden, petitioners, are plaintiffs and also defendants in the civil action appealed from the California Supreme Court.

State of the Art, Inc., is a plaintiff and defendant in the civil action appealed from the California Supreme Court.

David S. Samuels, George Riviere and David W. Hanna, are (or were) Officers of State Of The Art, and are individual co-defendants in the civil action appealed from the California Supreme Court.

Robertson, Stephens & Co., is a corporate entity defendant allegedly involved in the stock fraud issues appealed from the California Supreme Court.

TA Associates, is a corporate entity defendant allegedly involved in the stock fraud issues appealed from the California Supreme Court.

Frank A. Barcott, Barcott Security and Investigations, is the defendant that have allegedly stalked, spied upon, and are alleged to have issued slanderous and untrue statements against petitioners to their neighbors in the case appealed from the California Supreme Court.

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OPINIONS BELOW

The decision of the Supreme Court for the State of California, No. S068393, filed April 15, 1998, that denied a review of Petitioners' arguments opposing the Court of Appeals dismissal (upon a bankruptcy trustee's motion for same) of their case that contained personal injury claims (Appeal No. G015971). The order granting the bankruptcy trustee's motion was based upon his assertion of exclusive standing -- even as to the personal injury aspects of the case. The premise advanced by the bankruptcy trustee for his motion was that the U.S. Supreme Court had declined to grant certiorari for Mildens' 1997 petition to the U.S. Supreme Court (No. 97-334) that amongst other things contested the jurisdiction of the federal courts over their personal injury claims that were not removed from the jurisdiction of the California Courts.

Petitioners' standing to sue for harm to their personal and professional reputations, mental and emotional well being, and their right to present their evidence of imparement to a jury in order to vindicate their maligned conduct, is the linchpin of this Petition. Accordingly, a copy of Respondant State Of The Art's response in opposition to certiorari by the California Supreme Court, a copy of the Joinder to State Of The Art's response, filed by Frank A. Barcott, and a copy of the Dismissal Order entered by the Court of Appeal of the State of California, Fourth Appellate District, Division Three; and the order granting the Trustee's motion, are believed to be the only relevant documents for the Appendix of this instant Petition.

A review of the procedural history within the California State court system leading to the denial of Petitioners' rejection by the California Supreme Court is sought pursuant to U.S. Supreme Court Rule 10(b) and 10(c).

I. JURISDICTION OF SUPREME COURT

The Supreme Court is granted jurisdiction of this cause pursuant to 28 U.S.C. § 1257(a) (As amended June 27, 1988, Pub.L. 100-352, § 3, 102 Stat. 662). The cause was timely appealed from a final decision of a California Superior Court (Nos. 64934 & 651290 (consolidated)) to a California Court of Appeals (No. G015971), and by timely petition to the California Supreme Court that denied a review of dismissal of Petitioners' civil suit, Petition No. S068393, by an order filed on April 15, 1998.

II. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Provisions of the U.S. Constitution

U.S. Const. Art. VI, cl. 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; .... , shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

U.S. Const. Amend. 5, cl. 4:

"No person ... shall be ... deprived of life, liberty, or property, without due process of law;"

U.S. Const. Amend 7, cl 1:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,"

U.S. Const. Amend. 10:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

U.S. Const. Amend. 14, Sec. 1:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Provisions of the Constitution of the State of California (November 5, 1974)

Constitution of the State of California, Article I, Sec. 1:

"All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

Constitution of the State of California, Article I, Sec. 7:

"(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws ....."

"(b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens....."

Constitution of the State of California, Article I, Sec. 16:

"Trial by jury is an inviolate right and shall be secured to all ...."

Constitution of the State of California, Article I, Sec. 24:

"Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."

Constitution of the State of California, Article I, Sec. 26:

"The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

Constitution of the State of California, Article IV, Sec. 10:

" .... Superior courts have original jurisdiction in all causes except those given by statute to other trial courts."

Relevant Provisions of Federal Law

28 U.S.C. § 157: Procedures

"(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(b)(2) Core proceedings include, but are not limited to --

(A) matters concerning the administration of the estate; ...." and,

"... (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims."

28 U.S.C. § 1334: Jurisdiction, Bankruptcy cases and proceedings

"(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(c)(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11, but not arising under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding ... "; and,

"(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate."

28 U.S.C. § 1452: Removal of claims related to bankruptcy cases

"(a) A party may remove any claim or cause of action in a civil action ... to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title."

Relevant provisions of the Laws of the State of California

Cal. Civ. Code, Sec. 22: Law Defined

"Law is a solemn expression of the will of the supreme power of the State."

Cal. Civ. Code, Sec. 22.1: Supreme power; expression of will

"The will of the supreme power is expressed:

(a) By the Constitution.

(b) By the Statutes."

Cal. Civ. Code, Sec. 22.2: Common law of England; rule of decision

"The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State."

Cal. Civ. Code, Sec. 43: General personal rights

"Besides the personal rights mentioned or recognized in the Government Code, every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations."

III. STATEMENT OF THE CASE

In papers timely filed with the California Supreme Court there were distinctions made by Petitioners relating to prior Ninth Circuit holdings affecting the powers of a bankruptcy court affecting federal bankruptcy or other federal authority to prevent a litigant from continuing an action based upon its non-property components seeking redress before a jury at trial for pre-bankruptcy conduct by respondents that involved egregious mental and emotional distress, defamation of character, and a concerted effort at professional assassination, by the Respondents against Petitioners.

The relevant facts and history of matters proceeding through federal courts are described in Petitioners' 1997 Petition to this Court No. 97-334. This Petition seeks only review of the events that took place in the California Court of Appeals and afterward as they unfolded after the long awaited U.S. Supreme Court action upon the 1997 Petition for certiorari, 97-334. All parties served by this Petition, and the U.S. Supreme Court, are possessed with the filings in that earlier Petition here, and for purposes of brevity and clarity references to provisions contained in that prior Petition here

are quoted within this text by reference to that prior petition, but without inclusion in the appendix supplied herewith.

The narrowed scope of this Petition from the prior Petition to this Court concerns limitations upon jurisdiction of federal courts across the board with regard to certain realms of private causes arising from the common law of England, as incorporated into the laws of the several states. The focus of this Petition is to ask the U.S. Supreme Court to affirm the duty of States to preserve their institutions and to insure equal protection under their laws to all their citizens properly seeking justice in their courts -- even when this means that they must stand against federal courts that would seek to wrongfully influence that process. Petitioners made such an argument without response from the State courts herein petitioned from.

A now common perception exists that federal courts are "superior" courts to the "lower" courts of the state. The perception extends to such an extreme within the federal and state courts that there appears to exist a complete breakdown of our federalism within judicial regions spotted over our nation, and certainly including the State of California. Federal court opinions and officers of federal courts are now routinely encroaching upon realms of individual conduct protected by common law since the beginning of our nation. Petitioners are presenting here an understanding shared with members of the Justices of this Court that such is not, and never has been, the constitutionally authorized manner of federal conduct by the officers of government of the United States of America.

Notwithstanding any assertion in contradiction, causes relating to redress from alleged offenders of a citizen's reputation or character remain causes that arise under the laws of the member state of the union, and not causes that arise under any authority granted to the Congress under Article I, the President under Article II, or to the Supreme Court under Article III, of the U.S. Constitution. Nonetheless, federal courts in the Ninth Circuit have claimed a preemptive jurisdiction over such matters (even those still pending within cases never removed from state court to a

federal court) upon the theory that: 1) monetary compensation is tendered as remedy for any wrong that may be proved at trial; 2) that money is property; and, 3) that federal courts retain jurisdiction of all property of the debtor and the debtor's estate as a matter of its *core* jurisdiction under 28 U.S.C. § 157(b)(1), B(2)(A), and (b)(2)(O), and 28 U.S.C. § 1334(e).

Since monetary remedy is often times the least of the aspects of redress sought in privacy invasion and character assault cases, the rationale of the federal courts alleging jurisdiction over matters so remote that they offer no tangible pre-judgment value to the estate utterly falls apart under scrutiny of an objective examination. Further, the interruption of the proceedings in a state court exposes the aggrieved party to further exploitation by their adversaries in federal forums which disclaim any interest in the non-pecuniary distresses of the action. Specifically, the unlawful invasions of privacy become accelerated, and the efforts of private citizens to simply defend and protect their name and reputations become acts perceived to frustrate the federal processes.

In short, this Petition describes 1) the exclusive jurisdiction of the State of California over certain aspects of a case duly filed in California Superior Court; 2) the interference in that pending case by a federal court through its appointees; 3) the complained of here tolerance by the California courts of such interference; and, 4) the usurpation of authority and dereliction of duty by the federal and state courts under these circumstances.

If the U.S. Supreme Court shall decide to hear this Petition, it will find its interests described in Supreme Court Rule 10(c) to be the predominate interests served. The challenge of this Petition reaches further than a mere dispute of federal vs. State jurisdiction over issues. It reveals federal and State encroachment into the realm of private jurisdiction relating to self-defense and self-protection that is co-equally recognized and held apart from the federal powers granted under the U.S. Constitution and its just laws. and not granted to the States under their respective constitutions.

The Supreme Court Rule 10(b) interests by this Court relate to the tacit capitulation by the California State courts to an asserted but false jurisdiction by the federal courts held otherwise by the U.S. Supreme Court and other State Supreme Courts. By simply issuing orders granting motions of dismissal, the State courts have superficially avoided a state creation of an important "federal question". Nonetheless, the dismissals run contrary to principles of federalism expressed by the Supreme Courts of other states, and the U.S. Supreme Court in unresponded to terms raised on appeal. The appearance here is that the federal courts have a general disregard for the substantive rights of individual litigants appearing before them. This circumstance (if true) results in an atmosphere that may be spreading to the State courts. Society at large has begun to sense their vulnerability in the nations courts. The nortorious bankruptcy scandals of the past ten years have provided ample reason for the public to question its trust of the federal and now State court systems.

This petition provides the U.S. Supreme Court the opportunity to clarify an important, but clouded, realm of jurisdictional and procedural practice.

IV. ARGUMENT

1. The California courts have allowed a violation of petitioners' constitutionally protected right to due process in terms meant by the Fifth and Fourteenth Amendments to the U.S. Constitution, and Article I Sec. 7, of the Constitution of the State of California.

a. Procedural History:

Petitioners were parties to a case pending in state court (No. 645934, Cal. Superior Court, Santa Ana, CA) that was originally brought there by Respondent State of the Art, Inc. ("SOTA"), who is also an alleged fraudulent claimant to Petitioners' Chapter 11 proceeding in bankruptcy court. It was a multiple tort action that contained unsupported

allegations of Petitioner wrongdoing, and unsupported claims of damages allegedly in the amount in excess of $7 million. Petitioners have at all times utterly and completely denied any wrongdoing.

Meanwhile, Petitioners had begun their own discovery which uncovered deliberate misrepresentations made to them and to the public in an IPO relating to the value of stock that had been repurchased by SOTA from petitioner Charles Milden. Petitioners also discovered that they had been surveiled in their home and neighborhood, followed around town, and that curious inquiries from their neighbors were met with responses by the off-duty police personnel involved in the private surveillance that asserted that Mr. Milden was under suspicion of criminal activity. Petitioners subsequently filed a complaint against SOTA and its responsible officers, TA Associates, Robertson Stephens, & Co., Frank A. Barcott, and Barcott Security, for securities fraud, fraud, wrongful invasion of privacy, wrongful defamation of character, and wrongful imposition of mental and emotional distress.

After his appointment to the Petitioners' bankruptcy action, the bankruptcy trustee met with the Petitioners' adversaries. A deal was struck between Petitioners' adversaries and the trustee. The deal was for all the adverse parties to pay sums of money that totaled in an amount that was approximately double the Petitioners' undisputed creditors' claims in exchange for the trustee's agreement to dismiss all of Petitioners claims against the Respondents. The aforementioned agreement was couched in the form of a "Compromise Agreement", and approved by the U.S. Bankruptcy Court, the district court on appeal, and the U.S. Court of Appeals for the Ninth Circuit.

A linchpin issue of that state court suit became whether attacks upon character, acts imposing emotional distress, and invasions of privacy, were "personal injury tort" issues under the meaning of 28 U.S.C. § 157(e). The Ninth Circuit held that they were not "personal injury tort" issues under subparagraph (e) in agreement with the district court

and bankruptcy court arguments that the issues did not contain physical injury or death claims.

In respect for the Supreme Court's prior denial of Petitioners' arguments in their 1997 Petition for Certiorari that lets stand a Ninth Circuit holding against them, Petitioners do not reassert their prior argument of "personal injury tort" under 28 U.S.C. § 157(e).

The issue before the California Supreme Court, and the issued petitioned to be reviewed upon argument before the U.S. Supreme Court on certiorari, *is that*: Monetary issues aside, an action seeking a court of competent jurisdiction to provide remedy for non-physical wrongs directed at the persons of the citizens seeking redress is not an action that may be brought by any party except the persons alleging the harm, and by that principle only the harmed parties may obtain *standing* with respect to those issues.

In this case, the bankruptcy trustee asserted *exclusive standing* in the civil case pending in the California courts in order to obtain his requested dismissal of the action. Upon that premise the California courts have successively dismissed the Petitioners action without comment to the non-monetary issues involved.

b. California Statutory Provisions:

The dismissal by the trial court, the California Court of Appeals, and the Supreme Court of California, constitute a deprivation of protections guaranteed to all citizens of the State of California by the Constitution of the State of California, and its just statutes made in pursuance thereof. These deprivations fall into four major categories, as follows:

The general personal rights that are protected by California law are found at *Cal. Civ. Code, Sec. 43, General Personal Rights*, and include the non-property, non-physical injury, rights of protection *"... from personal insult, from defamation, and from injury to his personal relations."* These are, of course the very nature of personal rights that Petitioners have asserted all along to be beyond the reach of

any third party affiant, including the U.S. Bankruptcy court and its appointees.

These rights are a statutory recognition by the California legislature of the common law rights of England[1], that were presented in Petitioners' petition to the U.S. Supreme Court last year, Case No. 97-334, at Part E., pages 22-23.

The inclusion of these rights into the realms of state law in California are specifically provided at *Cal. Civ. Code, Sec. 22.2, Common law of England; rule of decision*, and this provision was raised in opposition to the trustee's Motion for Dismissal at the appellate level, and on Petition to the California Supreme Court.

In addition, and in order to refine the primacy of California law above any other, *Cal. Civ. Code, Sec. 22: Law Defined*, asserts that: "Law is a solemn expression of the will of the supreme power of the State."; and *Cal. Civ. Code, Sec. 22.1: Supreme power; expression of will*, declares that: "The will of the supreme power is expressed:

(a) By the [California] Constitution.

(b) By the [California] Statutes."

The California Superior Court (wherein the Petitioners' claims were pending prior to the dismissals) is granted jurisdiction to hear non-monetary/non-physical injury matters such as these directly under Article IV, Sec. 10, of the Constitution of the State of California, to wit: ".... Superior courts have original jurisdiction in all causes except those given by statute to other trial courts." There is no other venue given by the California Constitution, nor by California Statutes, the " ... will of the supreme power" of the State of California, for any other venue or forum to decide these claims.

Yet, the Ninth Circuit in 1997 declared upon these issues before them then that *"[w]e have held that a debtor's*

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1 See: Blackstone's Commentaries, Of Rights Of Persons, Vol. 1, pp. 7, 21, 22.

pre-petition emotional distress claim is property of the estate under 11 U.S.C. § 541 regardless of state law." (Petition 97-334, pp. 23, app. pp. 11-12)

c. The Federal Factor in State Court:

Having shown the origin of law governing the nature of these claims, and the statutory inclusion without exception of these claims, to have both been within the jurisdiction of the providence of the laws and courts of the State of California, where does the Ninth Circuit find its own power to disregard "state law"? It doesn't. Instead it attempts to make the "property" from any monetary compensation that may be yielded from a non-physical personal injury case an "asset" of the estate in order to assert "core" jurisdiction under title 11, under the "catch all" jurisdictional allotment provisions of 28 U.S.C. § 157(b)(2)(A), and (b)(2)(O).

The logical infirmity of the Ninth Circuit's assertions rest in the fact that 28 U.S.C. § 157 does not confer original jurisdiction over matters pending in a state court to the district court. Instead, this federal statute is used procedurally to ascertain a distinction between "core" and "non-core" issues that have arisen in, or are related to a case proceeding under title 11, provided that the case has been properly removed from the jurisdiction of the state to the jurisdiction of a federal district court, pursuant to 28 U.S.C. § 1452, contingent upon a federal district court's jurisdiction under 28 U.S.C. § 1334 (not §157), in accordance with removal procedures prescribed by F.R.B.P. 9027. It is an undisputed matter of fact that no such removal had ever taken place in this case, and as a result any argument of a "federal jurisdiction" is void.

But, even if a timely effort had been made by a proper moving party to remove the action pending in State court to the jurisdiction of the district court, would it have been supportable under federal law? The answer is no. 28 U.S.C. § 1452 (the removal statute) is quite clear in its text that conditions a removal action at sub-paragraph (a) " ... to the district court where such civil action is pending, *if such*

district court has jurisdiction of such claim or cause of action under section 1334 of this title." (emphasis added)

Does it? Does the district court under 28 U.S.C. § 1334 obtain jurisdiction (judicial authority bestowed by the U.S. Congress under its Article I powers defined in the U.S. Constitution) to assert a determination of the case pending in State court? No, it does not. The provision of 28 U.S.C. § 1334 at sub-section (c)(2) is quite clear that mere motion to abstain from asserting federal jurisdiction over matters "... *based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, ...*" requires that the district court "*... shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.*" (emphasis added)

If any party had attempted to remove the case from State court, Petitioners would have timely motioned for abstention, since the matters were scheduled to go to jury trial within a few short months (way back in 1992!). But Petitioners could only object to the federal courts' clearly stated disregard of State law, because the case was never attempted to have been removed. Notwithstanding all the commentary by the federal courts that the California courts have appeared to have heeded, the fact remains that non-physical personal injury issues arise only under State law -- not any federal law, and there is absolutely no provision of federal law, nor any possibility of any provision of federal law, that would allow an alter-ego bankruptcy trustee to displace the actually injured persons in a non-physical personal injury case, by asserting himself as the "real party in interest" as trustee. This category of case is clearly of that nature contemplated by the U.S. Congress to be apart from even its sweeping jurisdictional intentions when it drafted the Bankruptcy Reform Act of 1978, as amended in 1984.

d. Controlling Law Governing California Courts:

Mindful of the above, Petitioners cannot represent to the U.S. Supreme Court why the California Court of Appeals dismissed their claims relating to non-physical personal injury. The California courts have not themselves "decided" the issues, nor have they asserted any authority under California law that pertains to the circumstances described herein. There has been no trial before a civil jury of these matters, even though so much effort has been expended by Petitioners to simply obtain their day in court, in quest of their entitled protections under the laws of the State of California.

Under California law, the California courts are required to submit to a provision of law found at Article I, Sec. 26, of the Constitution of the State of California, that declares in unambiguous terms as follows:

"The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." There are no "other words" that relieve the California Superior Court of its jurisdiction imposed by Article IV, Sec. 10, as cited above. None. None under State law. None under federal law. The U.S. Constitution at Article X of its Amendments, is quite clear that powers retained by the States, that are not prohibited to them by the U.S. Constitution, and are not granted to the United States by any provision of the U.S. Constitution (such as non-physical personal injury, as set forth by Cal. Civ. Code, Sec. 43, described above), are *"reserved to the States respectively, or to the people ..."*, to the exclusion of the powers granted to the United States. The courts of the State of California are obligated to observe the *"supreme will"* of the people of the State of California, see to it that any and all personal injury against a citizen of the State of California is presented to a trial by jury when the person so damaged repeatedly insists that it be done. There is no federal power under the U.S. Constitution that may impair or destroy this fundamental private right. There is no authority inherent in any State that may allow it to deny a citizen of that State access to its courts in order to vindicate a damaged reputation, present evidence

of crimes arising under the laws of that State that are alleged to have been perpetrated against them, or to subvert the process of allowing an impartial jury to enter an independent judgment of the issues presented.

e. Trial By Jury:

California courts are required by operation of Article I, Sec. 16, of the Constitution of the State of California, to observe to themselves and to all others that "Trial by jury is an inviolate right and shall be secured to all ..." Inviolate means: "intact; not violated; free from substantial impairment."[2] Since the right to jury trial is, by operation of the "*supreme will*" of the people of the State of California, still intact by definition of the term inviolate, your Petitioners must call upon a higher authority in order to obtain their forum for redress. This U.S. Supreme Court is that higher forum.

Moreover, the *"[r]ights guaranteed by [the California] Constitution are not dependent on those guaranteed by the United States Constitution."* See: Art. I, Sec. 24, Const. of the State of California. Furthermore, *"[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws ....."* See: Art I, Sec. 7, Const. of the State of California. Again the point must be brought forward that the California courts have utterly failed to do their own duty under the "mandatory and prohibitory" commandment of Art. I, Sec. 26, of the California Constitution, to simply provide a forum to hear your Petitioners' non-physical personal injury case.

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2 Black's Law, 6th Ed. (1990), pp. 826, see: Com. v. Almeida, 362 Pa. 596, 68 A.2d 595.

V. REASONS WHY THIS WRIT SHOULD ISSUE

1. Superintendence Of A Federal Court System.

The inferior federal courts of the Ninth Circuit appear to be out of the control of the U.S. Constitution, the Congress of the United States, and the U.S. Supreme Court, as evidenced by the clear conflict of authority contained within the respective writings of each. As a general proposition, the written words of the U.S. Supreme Court, the U.S. Congress, and the U.S. Constitution are in consistent agreement upon the importance of 'our federalism' and the meaning of our law vs. the derisive, contemptuous and constitutionally repugnant writings of the Ninth Circuit and many of its lesser minion courts and officers on the other.

In a civil society, ordinary people must be able to use their courts to defend themselves from tyranny. The federal courts of the Ninth Circuit have run roughshod over the California State courts and the laws of the State of California for many years. The capitulation of the California Supeme Court and the California Court of Appeals to federal will in opposition to, and openly declared disregard of, California law is evidence of the degree of influence that has permeated California's judicial system. Failure to grant certiorari and correct this runaway federal system in the Ninth Circuit serves to endorse tyranny, and separate the governed further from what has become a notorious outrage in place of a respected institution.

The U.S. Supreme Court should grant certiorari upon grounds that it always must act to quash judicial activity that subverts the supreme will of the people -- whether it be the federal judiciary, the judiciary of the State, or both.

2. Comity With State Law, and State Judiciary.

Granting this Petition gives a clear acknowledgment to the State of California that the United States Supreme Court respects the State of California, her Constitution and laws, and has no intention of allowing renegade courts within

the Ninth Circuit to generate dominion over California citizens seeking redress under California laws in California's own courts. As a matter of superintendence, the U.S. Supreme court is called upon to see to it that federal courts begin to *find* the law, *obey* the law, and altogether *support* the enforcement of the law.

The California Supreme court has bowed to the courts of the Ninth Circuit who have openly declared that *"... all pre-petition causes of action become property of the estate without regard to state law."* [3] But Petitioners have shown that causes of action involving personal injury are exclusively within the providence of the damaged party (powers reserved to "the people"), to the exclusion of all others, and always invoke the protections of the laws of a State under which the justicible issues arise. There are no federal personal injury laws.

The above quoted holding by the Ninth Circuit has no basis in law, no basis in fact, no basis in reason, and for those reasons it provides compelling justification for the U.S. Supreme Court to renounce and condemn such a nullity presented as law.

3. Due Process and Equal Protection.

Under California's own Constitution, Art. I, Secs. 1, 7, 16, 24, and 26, the California courts are deprived of any authority to grant the dismissal motion that underlies this Petition. Petitioners urge the U.S. Supreme Court to renounce the conduct of the Ninth Circuit, support the primacy of State law over the subject of personal injury claims by citizens of the states and citizens of the United States, and require the California Supreme Court to remand this case (at least in part as to its non-physical personal injury claims) back to the trial

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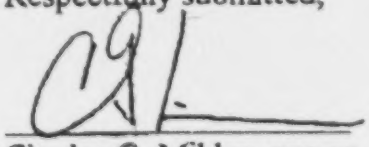
3 See: Milden, et al v. Joseph, Trustee, et al, ___ U.S. ____ (No. 97-334), (1997), Petition at 23, Appendix at 6; See also, Sierra Switchboard Co., 789 F.2d at 709, Matter of Geise, 992 F.2d 651, 655 (7th Cir. 1993); In re Cottrell, 876 F.2d 540, 542-43 (6th Cir. 1989); Tignor v. Parkinson, 729 F.2d 977, 980 (4th Cir. 1984).

BEST AV

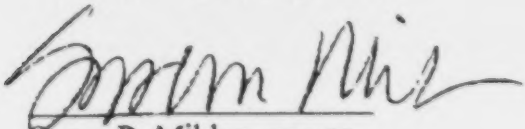
court for the demanded jury trial. Underlying authority to the U.S. Supreme Court obtains from Article XIV of the Amendments to the U.S. Constitution, Sec. 1., wherein the supreme law of the United States declares that *"[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."* Although Petitioners are the only parties with standing to make the personal injury claims pending in the State court, they have not been allowed access to their own courts for purposes of a demanded trial. Upon its face this fact is indisputable, reprehensible, and inexcusable, under the due process and equal protection clauses of the United States and California constitutions.

The U.S. Supreme Court must remind the State courts that theirs is a solemn duty to preserve the protection of the laws to the people of the State, and to act as the first and final bulwark against any aggressor against those laws -- even when it is a federal aggressor such as the courts of the Ninth Circuit.

Respectfully submitted,



Charles G. Milden, pro se



Susan P. Milden, pro se

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Fourth Appellate District, Division Three. No. G015971
S068393

IN THE SUPREME COURT OF CALIFORNIA

CHARLES MILDEN, Appellant

v.

STATE OF THE ART INCORPORATED Et Al.,
Respondents

Appellant's petition for review DENIED.

FILED
APR 15, 1998
Robert (unreadable), Clerk

GEORGE

Chief Justice

THE SUPREME COURT OF THE STATE OF CALIFORNIA
NO: S068393

CHARLES G. MILDEN and SUSAN P. MILDEN Plaintiffs/Appellants, v. STATE OF THE ART, INC.; ET AL Defendants/Respondents.	4TH Civil No: G015971 Orange County Superior Court Nos. 645934 and 651290 consolidated

RESPONDENTS' ANSWER TO PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION

ON APPEAL FROM THE FINAL ORDER OF THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE

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Counsel for Respondents
Frank A. Barcott Security
and Investigations

JOINDER IN AND INCORPORATION OF
ANSWER BY STATE OF THE ART

Respondent Frank A. Barcott Security Investigations, hereby joins in the Answer to Petition for Writ of Mandate and/or Prohibition which was heretofore filed by Respondent State of the Art, and incorporates that Answer and points and authorities as though set out at length on behalf of Respondent Frank A. Barcott Security Investigations.

DATE: March 24, 1998 SMITH, SMITH & HARTER

By /s/_____
E. Gary Smith
Counsel for Respondent
Frank A. Barcott Security
and Investigations

THE SUPREME COURT OF THE STATE OF CALIFORNIA
NO: S068393

CHARLES G. MILDEN and SUSAN P. MILDEN Plaintiffs/Appellants, v. STATE OF THE ART, INC., ET AL Defendants/Respondents.	4TH Civil No: G015971 Orange County Superior Court Nos. 645934 and 651290 consolidated

RESPONDENTS' ANSWER TO PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION

ON APPEAL FROM THE FINAL ORDER OF THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE

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I.
INTRODUCTION.

Petitioners Charles and Susan Milden ("Petitioners") are chapter 7 debtors. Petitioners' Petition for Writ of Mandate and/or Prohibition (the "Petition"), seeks to circumvent a federal bankruptcy court's order approving a settlement negotiated by the trustee of Petitioners' chapter 7 bankruptcy estate of Petitioners' pre-bankruptcy causes of action. Petitioners have sought the reversal of the bankruptcy court's approval of that settlement -- on five separate occasions -- in the federal appellate courts. Both the United States District Court for the Central District of California and the United States Court of Appeals, Ninth Circuit affirmed the bankruptcy judge's order. The Supreme Court of the United States denied Petitioners' Petition for Certiorari and their Petition for Rehearing.

Dissatisfied with their lack of success in the federal courts, Petitioners now invite this court to second-guess the administration of a federal bankruptcy estate. Their invitation arrives masquerading as an appeal from the Orange County Superior Court's dismissal of their pre-bankruptcy claims.

This court must refuse Petitioners' invitation. As chapter 7 debtors, Petitioners lack standing to prosecute an appeal concerning the pre-bankruptcy claims. These claims, as a matter of law, belong to Petitioners' bankruptcy estate, and can only be pursued by Trustee. Further, Petitioners cannot show that review is necessary "to secure uniformity of decision or the settlement of important questions of law[,]" the only applicable ground for this court's review under California Rules of Court, rule 29(a). This court should deny the Petition.

II.
STATEMENT OF FACTS AND PROCEDURAL HISTORY.

A. Initial Proceedings In The Superior Court.

On December 31, 1990, State of the Art, Inc. filed a Complaint against Petitioner Charles Milden (OCSC Case No.

645934), seeking damages and injunctive relief for, *inter alia*, breach of contract and misappropriation of trade secrets. On March 4, 1991, Petitioners filed a separate action against State of the Art, David S. Samuels, George Riviere, David W. Hanna (collectively "SOTA"), Robertson Stephens & Co. ("RSC"), and other named defendants (OCSC, Case No. 651290). Petitioners sought damages for, inter alia, intentional and negligent infliction of emotional distress, and rescission of State of the Art's prior repurchase of Milden's State of the Art stock (the "Pre-Petition Claims[1]"). The Superior Court consolidated the two actions on August 24, 1991. (the "Superior Court Action")

B. Petitioners' Bankruptcy Filing and Appeals.

1. The Bankruptcy Court Proceedings.

On October 24, 1991, approximately two months before the scheduled trial of State of the Art's lawsuit against Mr. Milden, Petitioners filed a chapter 11 petition in the United States Bankruptcy Court. Petitioners' original schedules failed to designate their Pre-Petition Claims as assets exempt from administration.[2] On October 8, 1992, the bankruptcy court granted the motion of the Office of the United States Trustee to convert Petitioners' bankruptcy case from chapter 11 to chapter 7, and appointed a trustee

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[1] Petitioners' claims in the Superior Court Action are "pre-petition" claims, because they were filed before Petitioners' bankruptcy petition.

[2] Section 522 of the Bankruptcy Code permits debtors to exempt certain assets from their estate to facilitate a "fresh start" following discharge. Rule 4003(a) of the Federal Rules of Bankruptcy Procedure requires assets claimed as exempt to be listed in the schedules required to be filed by the debtor pursuant to rule 1007. Section 522, in conjunction with California Code of Civil Procedure section 703.130, permits debtors filing in California to elect between the exemptions contained in Code of Civil Procedure section 703.140, or the general statutory scheme for exemptions from judgments provided for in the Code of Civil Procedure.

("Trustee") to liquidate Petitioners' estate.[3] Petitioners did not appeal this order. Control over Petitioners' estate, including the Pre-Petition Claims, transferred to Trustee as a matter of law.

Two months later, Trustee, on behalf of the estate, settled the Pre-Petition Claims against SOTA, Inc., RSC and co-defendant TA Associates ("T/A"). Trustee sought bankruptcy court approval of the settlements under rule 9019(a) of the Federal Rules of Bankruptcy Procedure. The bankruptcy court approved the estate's settlement with RSC on March 24, 1993, and the settlements with SOTA and T/A on May 19, 1993. Petitioners filed a notice of appeal from this order on May 24, 1993.

On September 20, 1993, four months later, Petitioners filed and served an amended bankruptcy schedule that sought, *for the first time*, to exempt the Pre-Petition claims from Trustee's administration. On October 15, 1993, Trustee filed and served his objections to Petitioners' amended schedule. A formal order sustaining Trustee's objections was entered on April 13, 1994. On the same date, the bankruptcy court entered an order approving Trustee's settlement with the final defendant Frank A. Barcott Security and Investigations ("Barcott"). Petitioners noticed Appeals from both orders on April 18, 1994.

2. The District Court Appeals

The United States District Court, the Honorable Gary L. Taylor presiding, addressed Petitioners' appeals from the bankruptcy court's orders in two separate hearings. The first set of challenged orders related primarily to the settlements

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[3] Petitioners initially filed their petition under chapter 11, which generally provides for the "reorganization" rather then the "liquidation" of a debtor's estate. However, section 1112 of the Bankruptcy Code provides that the United States Trustee, any creditor, or any party in interest, may move, under certain circumstances, to transform (or convert) a pending Chapter 11 "reorganization" case to a "liquidation" proceeding under chapter 7. The United States Trustee successfully moved to convert Petitioners' case to a chapter 7 proceeding.

Trustee entered into with SOTA, RSC and T/A. On June 6, 1994, Judge Taylor affirmed the first set of challenged bankruptcy court orders.

Petitioners also appealed the bankruptcy court orders approving Trustee's settlement with Barcott and denying Petitioners their claimed exemptions in the Pre-Petition Claims. On September 20, 1994, Judge Taylor affirmed the second set of challenged orders. Petitioners noticed appeals from all of Judge Taylor's rulings to the United States Court of Appeals, Ninth Circuit.

3. The Ninth Circuit Appeal.

In an unpublished decision entered April 16, 1997, the Ninth Circuit affirmed all of Judge Taylor's decisions. On April 30, 1997, Petitioners filed a Petition for Rehearing and Suggestion for Hearing *En Banc*. On June 12, 1997, the Ninth Circuit denied that petition.

4. Petition for Certiorari to the Supreme Court of the United States.

On or about August 13, 1997, Petitioners filed a Petition for Writ of Certiorari to the Supreme Court of the United States. On November 3, 1997, the Supreme Court denied the petition. Petitioners subsequently filed a Petitioner [sic] for Rehearing which the Supreme Court denied on January 12, 1998.

B. The Superior Court Dismissal.

Upon his appointment, Trustee made formal appearances in the Superior Court Action. In May 1993, the bankruptcy court approved settlements between the estate and SOTA, RSC, and T/A. Each of these defendants applied for, and obtained, determinations in the superior court that the settlements with Trustee were in "good faith" pursuant to Code of Civil Procedure section 877.6. Petitioners did not appeal from the good faith determinations.

Trustee pursued the remaining Pre-Petition Claims against Barcott in superior court, pending final court approval

of the Trustee's settlement with that defendant. On February 3, 1994, the superior court determined that the Barcott/Trustee settlement was in "good faith." Petitioners did not appeal from this order. Trustee had settled with all defendants to the Superior Court Action.

On its own motion, the court set for hearing on March 3, 1994, an Order to Show Cause why the entire Superior Court Action "as to all defendants" should not be dismissed, inasmuch as all defendants had settled with Trustee. Only Petitioners, counsel appearing specially on their behalf, and counsel for Barcott attended the hearing on the Order to Show Cause. "Good cause" having been shown to its satisfaction, the superior court dismissed the entire Superior Court Action by Order entered March 14, 1994. On May 13, 1994, Petitioners noticed an appeal from the dismissal.

C. The State Court Appeal.

Because the federal appeals above had not run their course, Trustee obtained leave from the California Court of Appeal, Fourth Appellate District, Division Three, to intervene in Petitioners' appeal from the superior court dismissal. Petitioners exhausted their federal appeals on January 12, 1998. Accordingly Trustee moved to dismiss the state court appeal. On January 20, 1998, the Court of Appeal dismissed Petitioners' appeal.

III.
PETITIONERS LACK STANDING TO PROSECUTE THIS APPEAL

Appeals may only be taken by aggrieved parties. (Code Civ. Proc., § 902.) Accordingly, Petitioners must be parties of record, and their rights or interests must be injuriously affected by the judgment below. *(County of Alameda v. Carleson* (1971) 5 Cal. 3d 730, 736-37 [97 Cal.Rptr 385, 488 P.2d 953]; *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1128 [269 Cal.Rptr. 844] Petitioners may not assert error that injuriously affected only non-appealing co-parties. (*Rebney, supra*, at 1128.)

Upon the filing of their petition in bankruptcy, "all legal or equitable interests of" Petitioners became property of their bankruptcy estate. (11 U.S.C. § 541(a)(1).) Unanimous authority establishes that "legal or equitable interests[,]" for purposes of Bankruptcy Code section 541(a), include causes of action. (*United States v. Whiting Pools, Inc.* (1983) 462 U.S. 198, 205 n.9; *Sierra Switchboard Co. v. Westinghouse* (9th Cir. 1986) 789 F.2d 705; *Bronner v. Gill* (9th Cir.B.A.P. 1992) 135 B.R. 645, 647.) Of course, a debtor can (and Petitioners did, unsuccessfully) seek to exempt causes of action from property of the estate. (*Bronner*, supra, at 647.) Until distributed, exempted, or abandoned, however, Petitioners' Pre-Petition Claims were and are property of their estate.

Upon his appointment, Trustee succeeded to all causes of action held by Petitioners at the time their bankruptcy petition was filed. (*Jones v. Harrell* (11th Cir. 1988) 858 F.2d 667, 669.) Trustee's duties included the collection and liquidation of all property of Petitioners' estate, including the Pre-Petition Claims, for the benefit of Petitioners' creditors. (11 U.S.C. § 704(1).) In this regard, Trustee was empowered to pursue the Pre-Petition Claims or , in his best judgment, compromise, settle or abandon them. (*In re Gibbons-Grable* Co. (Bkrtcy.N.D.Ohio 1991) 135 B.R. 514, 516.)

Federal bankruptcy case law holds that Trustee's mere appointment divested Petitioners of any standing to prosecute their Pre-Petition Claims. (*Bauer v. Commerce Union Bank* (6th Cir. 1988) 859 F.2d 438, 441; *Vreugdenhil v. Hoekstra* (8th Cir. 1985) F.2d 213, 215.) California case law is in accord, and requires Trustee's intervention as real party in interest, in addition to his appointment, to divest Petitioners of their standing. (*ABA Recovery Services v. Konold* (1988) 198 Cal.App.3d 720, 726 [244 Cal.Rptr. 27]; *Kaley v. Catalina Yachts* (1986) 187 Cal.App.3d 1187, 1195 [232 Cal.Rptr. 384].)

Here, Petitioners do not dispute their filing of a chapter 11 petition or the fact that their case was converted t

a proceeding under chapter 7 and a trustee appointed.[4] Petitioners also cannot contend that their Pre-Petition Claims were properly distributed, exempted,[5] or abandoned. Finally, Trustee intervened as real party in interest in the Superior Court Action.

Accordingly, Petitioners lack any standing to prosecute this appeal. Faced with similar circumstances, the Court of Appeal reached just this result in *People v. Kings Point Corp.* (1986) 188 Cal.App.3d 544 [233 Cal.Rptr. 227], where the court stated:

> Once it became clear ... that the trustee would not bring an appeal from the judgment in the superior court, and the [debtor] felt an appeal should be filed, its remedy was to petition the bankruptcy court to compel the trustee to file an appeal, or to authorize the [debtor] to file an appeal on its own behalf. Absent such authorization, [debtor] has no standing to bring this appeal.

(Id. at 549.)

Petitioners lack any standing to prosecute this appeal. This court should deny the Petition.

IV.
PETITIONERS FAIL TO ASSERT ANY LEGITIMATE GROUND FOR THIS COURT'S REVIEW.

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[4] Although Appellants contend the Bankruptcy Court erroneously converted their case, and have sought to appeal the conversion order, Appellants failed timely to file an appeal from the conversion order.

[5] While Appellants dispute the Order denying their claimed exemptions, that Order is now final, having been upheld twice on appeal in the federal courts.

California Rules of Court, rule 29(a) specifies the grounds for this court's review:

> Review by the Supreme Court of a decision of a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law; (2) where the Court of Appeal was without jurisdiction of the cause; or (3) where because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges.

Petitioners fall far short of asserting any of the enumerated grounds for review. Even Petitioners do not assert that the Court of Appeal lacked jurisdiction or that that court's decision lacked the required numerical concurrence. Further, and notwithstanding their fierce rhetoric, Petitioners fail to enumerate any unsettled question of law or divergence of authority which has adversely impacted their case.

Petitioners contend that they have been deprived of property without due process of law. The superior court, however, in dismissing the Superior Court Action, did not deprive Petitioners of any property. As stated above, undisputed California and federal law dictates that Petitioners' state law claims became property of their estate upon the voluntary filing of their bankruptcy petition. The challenged dismissal, therefore, pertained to property that did not belong to Petitioners.

Petitioners' contend that they have been deprived of their state and federal rights to trial by jury. Upon conversion of Petitioners' chapter 11 case to chapter 7, however, the authority to control the Superior Court Action passed to Trustee, as did the accompanying right to trial by jury. (*Bauer v. Commerce Union Bank* (6th Cir. 1988) 859 F.2d 438, 441).

Petitioners ask this court to reverse the superior court's dismissal of the Superior Court action, yet point to no error committed by the superior court. In truth, Petitioners' dispute is with prevailing and undisputed federal law concerning the administration of bankruptcy estates -- a power expressly reserved to Congress under Article I, section 8, clause 4.

Petitioners voluntarily chose to enter the federal bankruptcy system -- a decision they now clearly regret. However, in making that decision, Petitioners necessarily subjected their persons and their property, including the Pre-petition claims, to the jurisdiction of the federal courts.

After a complete exhaustion of Petitioners' federal appellate rights, the bankruptcy court's determination of the issues raised in the Petition has been affirmed. The superior court properly dismissed the Superior Court Action. The Petition should be denied.

DATE: March 23, 1998 RUTAN & TUCKER, LLP

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COURT OF APPEAL-4TH DIST.DIV.3
FILED
JAN 20 1998
STEPHEN M. KELLY, CLERK

DEPUTY CLERK

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

CHARLES MILDEN, et al., Plaintiffs and Appellants, v.	G015971 (Super. Ct. Nos. 645934 & 651290
STATE OF THE ART, INC. et al., Defendants and Respondents.	ORDER

We have read and considered the opposition filed by Charles and Susan Milden to the motion of the Chapter 7 Trustee to dismiss the appeal. The motion to dismiss is GRANTED.

SILLS, P.J.